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Supreme Court of the United States

OCTOBER TERM, 1968

No. 955

THE NATIONAL CASH REGISTER COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The findings of fact and opinion of the District Court (R. 13a-32a)[1] are reported at 270 F. Supp. 930. The opinion of the Court of Appeals (Appendix A, *infra*) is reported at 400 F.2d 820.

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[1] Record references are to the separately bound Appendix C to the Government's brief in the Court of Appeals, now the separately bound Appendix C to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1968, and a timely petition for rehearing was denied on October 23, 1968. (See Appendix B, *infra.*) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A United States corporate taxpayer received dividends in 1958 from its wholly-owned United Kingdom subsidiaries and elected, under Article XIII of the United States-United Kingdom Income Tax Convention, to take a direct foreign tax credit for the United Kingdom standard tax "appropriate to" those dividends. The question is whether the taxpayer may also take an indirect foreign tax credit under Sections 901 and 902 of the Internal Revenue Code for a fractional part of the remaining United Kingdom standard tax paid by the United Kingdom subsidiaries.

TREATY AND STATUTES INVOLVED

Income Tax Convention of April 16, 1945, between the United States and the United Kingdom, 60 Stat. 1377 (as amended by the Third Supplementary Protocol of August 19, 1957, 9 U.S. Treaties 1329, Art. II):

"ARTICLE I

"(1) The taxes which are the subject of the present Convention are:

"(a) In the United States of America:
The Federal income taxes, including surtaxes and excess profits taxes (hereinafter referred to as United States tax).

"(b) In the United Kingdom of Great Britain and Northern Ireland:
The income tax (including surtax), the excess profits tax and the national defense contribution (hereinafter referred to as United Kingdom tax).

"(2) The present Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting Party subsequently to the date of signature of the present Convention or by the government of any territory to which the present Convention is extended under Article XXII."

* * * * * * * * *

"ARTICLE XIII

"(1) Subject to Sections 901 to 905 of the United States Internal Revenue Code as in effect on the 1st day of January 1956, United Kingdom tax shall be allowed as a credit against United States tax. For this purpose

"(a) the recipient of a dividend paid by a corporation which is a resident of the United Kingdom shall be deemed to have paid the United Kingdom tax appropriate to such dividend, and

"(b) the recipient of any royalty or other amount coming within the scope of Article VIII of the present Convention shall be deemed to have paid any United Kingdom tax legally deducted from the royalty or other amount by the person by or through whom any payment thereof is made,

if the recipient of the dividend or royalty or other amount, as the case may be, elects to include in his gross income for the purposes of United States tax the amount of such United Kingdom income tax."

Sections 901, 902 and 904, Internal Revenue Code of 1954, as in effect on January 1, 1956, and for the year 1958, provide in part as follows (26 U.S.C. §§ 901, 902, 904; 68 A Stat. 285, 286):

"Sec. 901. *Taxes of Foreign Countries and of Possessions of United States.*

"(a) *Allowance of Credit.*—If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under section 902. * * *

"(b) *Amount Allowed.*—Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

"(1) *Citizens and Domestic Corporations.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States;

* * * * * * *

Sec. 902. *Credit for Corporate Stockholder in Foreign Corporation.*

"(a) *Treatment of Taxes Paid by Foreign Corporation.*—For purposes of this subpart, a domestic corporation which owns at least 10 percent of the voting stock of a foreign corporation from which it receives dividends in any taxable year shall be deemed to have paid the same proportion of any income, war profits, or excess profits taxes paid or deemed to be paid by such foreign corporation to any foreign country or to any possession of the United States, on or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the

amount of such dividends bears to the amount of such accumulated profits.

* * * * * * *

"(c) *Applicable Rules.*—

"(1) The term 'accumulated profits', when used in this section in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war profits, and excess profits taxes imposed on or with respect to such profits or income; . . ."

* * * * * * *

"Sec. 904. *Limitation on Credit.*

"(a) *Limitation.*—The amount of the credit in respect of the tax paid or accrued to any country shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources within such country (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year."

STATEMENT OF THE CASE

In 1958, petitioner received substantial dividends, together with other income, from two wholly-owned United Kingdom subsidiaries referred to in the record as "NCR Ltd." and "NCR Mfg." The subsidiaries had paid United Kingdom standard tax, profits tax and other miscellaneous income taxes on their earnings.[2] (R. 14a-15a, 18a)

In its Federal income tax return for the year 1958, petitioner included in its income the amount of United Kingdom standard tax "appropriate to" the fore-

[2] Since there is no legal distinction for purposes of this case between the profits tax and the miscellaneous income taxes, subsequent references to the profits tax will also apply to the miscellaneous income taxes.

going dividends and then claimed a foreign tax credit for that amount of standard tax, pursuant to Article XIII of the Income Tax Convention between the United States and the United Kingdom (the "Convention"). Petitioner also claimed a foreign tax credit under §§ 901 and 902 of the Internal Revenue Code (the "Code") for a fractional part of the remaining standard tax and the profits tax paid by its United Kingdom subsidiaries. (R. 22a-23a)

Upon final audit of petitioner's return, the Internal Revenue Service concluded that if a foreign tax credit for the standard tax appropriate to the dividends was allowed under the Convention, no credit would be allowable under the Code for any of the remaining standard tax, although a credit would be allowable under the Code for a fractional part of the profits tax. The Internal Revenue Service recognized that its interpretation of the law would result in a smaller foreign tax credit, and hence a larger net United States tax, than if the credit were computed under the Code alone. (R. 34a) Accordingly, the Internal Revenue Service recomputed petitioner's tax without regard to the Convention, by eliminating from income the amount of standard tax which petitioner had reported in its return, and allowing a foreign tax credit under the Code for a fractional part of all of the standard tax and profits tax paid by petitioner's United Kingdom subsidiaries. (R. 25a-26a)

Petitioner paid the resulting deficiency in full and filed a claim for refund in due course. (R. 13a-14a) Following denial of its claim, petitioner filed a timely suit for refund pursuant to 28 U.S.C. 1346(a)(1). (R. 3a) The District Court upheld petitioner's claim in full (R. 28a-32a), but was reversed on appeal by the Court of Appeals (Appendix A, *infra*).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is inconsistent with this Court's decision in *Biddle* v. *Commissioner*, 302 U.S. 573 (1938), and effectively deprives petitioner of the benefits of an international tax treaty between this country and the United Kingdom. The issue, which involves a pure question of law, is of importance to other United States corporations with subsidiaries operating in the United Kingdom. For all of these reasons, further review by this Court is warranted.

1. To understand why the decision below is inconsistent with this Court's decision in *Biddle*, it is necessary to review briefly the mechanics of the United States foreign tax credit system, the British standard tax system, and the Convention.

U. S. Foreign Tax Credit Rules:

United States individuals, and most other U. S. taxpayers, can obtain a foreign tax credit only for foreign taxes *actually* paid by the taxpayer in question.[3] However, there is a statutory exception to this rule in the case of a domestic corporation which owns at least 10% of the voting stock of a foreign corporation (referred to here as a "subsidiary") from which it receives dividends. On receipt of a dividend, the domestic corporation is treated in this situation *as if* it had paid certain foreign taxes actually paid by the foreign subsidiary.[4] Under §§ 901 and 902 of the Code (pp. 4-5, *supra*), the domestic company may take a credit for *both* its own foreign tax payments (the "direct"

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[3] See § 901(b)(1) of the Code, p. 4, *supra*, and Owens, The Foreign Tax Credit (Cambridge 1961), p. 5 and Chapter 6.

[4] See §§ 901(a) and 902(a) of the Code, pp. 4-5, *supra*, and Owens, op. cit., pp. 9-11, and Chapter 3.

credit) *and* a share of of the foreign taxes paid by the foreign subsidiary (the "indirect" credit). Section 902(a) of the Code provides the basic formula for determining what portion of the total foreign tax paid by a foreign subsidiary may be claimed as an indirect credit by the domestic parent company on receipt of a dividend. As construed by this Court in *American Chicle Co.* v. *United States,* 316 U.S. 450 (1942), the applicable statutory language means that the parent receiving the dividend will be deemed to have paid foreign tax equal to:

$$\frac{\text{parent's dividend income}}{\text{subsidiary's "accumulated profits"}^{5}} \times \frac{\text{subsidiary's "accumulated profits"}}{\text{subsidiary's "total profits"}^{5}} \times \text{total foreign tax paid by subsidiary}$$

If the fractions are simplified by dividing out the factor consisting of the subsidiary's accumulated profits, the arithmetic result becomes:

$$\frac{\text{parent's dividend income}}{\text{subsidiary's total profits}} \times \text{total foreign tax paid by subsidiary}$$

This formula was changed by Congress in 1962 but it was effective for many years prior to that time, including 1958, the taxable year involved here. See Treasury Regulations § 1.902-1(a) and (d) (26 C.F.R. Part 1, § 1.902-1(a) and (d)); Owens, op. cit., pp. 102-106.

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[5] In accordance with the terminology used in the record and §902 of the Code (p. 5, *supra*), the term "accumulated profits" will be used to designate the earnings remaining *after* the payment of foreign taxes and the term "total profits" will be used to designate the earnings *before* payment of such taxes.

The application of §§ 901 and 902 to a routine case where treaty relief is not available may be illustrated by assuming that in 1958 a U.S. parent corporation (P) owned all the stock of a foreign subsidiary (S). During that year, S had total profits of $1,000 on which it paid foreign income taxes of $400. Out of its accumulated profits of $600, it declared a dividend of $400 to P. Under the applicable foreign law, S was required to withhold on behalf of P a $40 tax on the dividend paid to P, so that P actually received a net dividend of only $360.

For U. S. tax purposes, a dividend withholding tax imposed by a foreign country on a U. S. shareholder is classified as a tax actually paid by the U. S. recipient of the dividend, even though the tax is remitted to the foreign government by the foreign subsidiary paying the dividend. In this situation, the foreign subsidiary does not pay tax on its own behalf, but acts instead as agent for the recipient of the dividend when it withholds the foreign tax due on the dividend. Thus, in the example above, P is entitled to a direct credit for the $40 withholding tax. However, since P is regarded as paying the tax, P must be treated as if it had actually received the full $400 dividend before paying out the $40 in tax. In other words, in order to claim the direct credit for the $40 withholding tax, P must include in income the declared dividend of $400, not just the net dividend of $360 which P actually received. Dividend withholding taxes have been treated in this fashion ever since the enactment of the first foreign tax credit provisions in 1918. See O.D. 147, 1 Cum. Bull. 232 (1919); I.T. 2762, XIII-1 Cum. Bull. 64 (1934); Rev. Rul. 57-516, 1957-2 Cum. Bull. 435; Owens, op. cit., pp. 111-112, 361-363.

Based on the foregoing, the computation of P's U. S. tax on the dividend would be as follows:

Total profits of S		$1,000
Foreign tax paid by S		400
Dividend income of P		400
Tentative U. S. tax of P at 52%		208
Direct credit for withholding tax on dividend	$40	
Indirect credit for taxes deemed paid (i.e., $400 dividend divided by $1,000 total profits, multiplied by foreign tax of $400)	160	
Total foreign tax credit		200
Net U. S. tax		8

The same example was used by the Government in its Court of Appeals brief (p. 12), and it is, therefore, undisputed that a corporation such as petitioner which receives dividends from a foreign subsidiary may take ***both*** a direct credit for 100% of any withholding taxes ***and*** an indirect credit for a fractional part of the foreign corporate taxes paid by the subsidiary, computed in accordance with the *American Chicle* formula.

The British Tax System:

Under the British standard tax system in effect prior to the Finance Act of 1965 (Eliz. 2, 1965 c. 25, Part IV), a British corporation paid standard tax on its profits in the year when earned. If a dividend was distributed to the shareholders, they included in income their pro rata share of the pre-tax corporate profits needed to pay such a dividend and then claimed a credit for the amount of standard tax payable on such

profits. The computations made by the shareholders were based on the standard tax rate in effect during the year of the distribution, even if this rate differed from the rate actually paid by the corporation on its profits. As pointed out by the Court of Appeals (Appendix A, p. 4a, n. 6), these rules meant that if a British corporation distributed $6 to a British shareholder in a year when the standard tax rate was 40%, the shareholder would report income of $10 and take a credit for $4. The $10 represents the pre-tax corporate profits needed to distribute a dividend of $6 after payment of a 40% tax, and the $4 represents the amount of such tax. In British terms, the $4 tax in the example is the amount of standard tax "appropriate to" the $6 net dividend received by the shareholder.[6]

Biddle and the Convention:

In the *Biddle* case, this Court held that a U. S. individual who received dividends from a British company was not entitled to a direct credit for the United Kingdom standard tax appropriate to his dividends, because he was not the "taxpayer" who paid the tax. Although British law treated the tax as one which was imposed on the shareholder, the Court concluded that the British corporation must be regarded as the taxpayer for U. S. purposes because the tax was levied, in the first instance, on the corporation's own profits. Since the Court based its decision on the ground that the shareholder was not the taxpayer for U. S. purposes, the decision made it totally impossible for individual U. S. shareholders to

[6] For a fuller explanation of the standard tax "appropriate to" a dividend, and the mathematical formula for computing such tax, see R. 16a-17a, *Biddle* v. *Commissioner*, *supra*, 302 U.S. at 575-577, 579-581 and Taxation in the United Kingdom, World Tax Series Harvard Law School (Cambridge 1957), pp. 257-258.

claim a foreign tax credit for the U. K. standard tax. Corporate shareholders were barred from obtaining a direct credit for the same reason, and under the then applicable rules, they could obtain an indirect credit only if they owned at least 50% of the voting stock of the British company.[7]

The *Biddle* decision represented a sharp break with prior practice. From 1918 until the mid-thirties, the Internal Revenue Service had treated the American shareholder as the party paying the U. K. standard tax, and had allowed the shareholder to claim a direct credit for the tax provided the amount of such tax was first included in the shareholder's income.[8] While the reversal of that position in the Biddle case was technically sound, the practical results of the new rule were harsh, and in recognition of this fact the scope of the *Biddle* decision was considerably narrowed by provisions included in the 1945 Income Tax Convention between the United States and the United Kingdom.[9]

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[7] See §131(f) of the Revenue Act of 1938, 52 Stat. 447, 508. The 50% stock ownership requirement originated with §238(e) of the Revenue Act of 1921, 42 Stat. 227, 259, and remained unchanged until 1951 when the figure was lowered to the present 10% level by §332(a) of the Revenue Act of 1951, 65 Stat. 452, 506.

[8] See *Biddle* v. *Commissioner, supra,* 302 U.S. at 582, and *Hearings Before A Subcommittee Of The Committee on Foreign Relations, United States Senate, on Conventions with Great Britain and Northern Ireland respecting Income and Estate Taxes* (79th Cong., 1st Sess.) p. 70, reprinted in *Legislative History of United States Tax Conventions* (U.S. Government Printing Office 1962) Vol. 2, p. 2583 at p. 2636.

[9] See Hearings, note 8, *supra;* Sen. Exec. Rep. No. 6, 79th Cong., 1st Sess., p. 11, reprinted in *Legislative History,* note 8, *supra,* p. 2651 at p. 2661.

The relevant portion of the 1945 Convention, as slightly modified by a 1957 supplementary protocol, reads as follows (p. 3, *supra*):

> "Subject to Sections 901 to 905 of the United States Internal Revenue Code as in effect on the 1st day of January 1956, United Kingdom tax shall be allowed as a credit against United States tax. For this purpose . . . the recipient of a dividend paid by a corporation which is a resident of the United Kingdom shall be deemed to have paid the United Kingdom tax appropriate to such dividend . . . if the recipient . . . elects to include in his gross income for the purposes of United States tax the amount of such United Kingdom income tax."

The parties agree that the term "United Kingdom tax appropriate to such dividend" refers to the standard tax appropriate to the dividend, determined in accordance with British law. (R. 17a)

In substance, if Convention relief is elected, the standard tax appropriate to the dividend is treated exactly like a dividend withholding tax. See Owens, op. cit., p. 366, n. 16, and pp. 372-373. The recipient of the dividend is treated as if he had received the full amount of the pre-tax dividend ($10 in the example on p. 11, *supra*) and then paid the foreign tax due on it ($4 in the example), thereby ending up with an amount of cash equal to the net dividend actually received ($6 in the example). In accordance with this approach, the full amount of the $10 pre-tax dividend is includable in the recipient's income for U. S. tax purposes, and a direct credit may be claimed for the $4 of standard tax withheld from that dividend. This is precisely the way in which regular dividend withholding taxes are treated.

(See p. 9, *supra*.) Consequently, by reason of the Convention, the direct credit allowable for the standard tax appropriate to the dividend is the same as it was prior to the *Biddle* decision. (See p. 12, at n. 8, *supra*.)

While Article XIII of the Convention treats the standard tax appropriate to the dividend as a withholding tax, nothing whatever is said about the remaining standard tax paid by the British company, or about other U. K. income or profits taxes. Petitioner contends, and the District Court held (R. 31a), that the remaining standard tax must be treated under the *Biddle* decision as a corporate income tax paid by the British corporation. Thus, it falls into the same category as the profits tax paid by the British company. Under §§ 901 and 902 of the Code, an American corporation owning 10% or more of the stock of the British company is therefore entitled, when it receives a dividend, to claim an indirect credit for the proper fractional part of those U. K. taxes.

In its brief in the Court of Appeals (p. 9, n. 5 and p. 28), the Government agreed that, if petitioner was allowed a direct credit pursuant to the Convention for the standard tax appropriate to the dividend, petitioner could also take an indirect credit for the proper fractional part of the profits tax paid by its U. K. subsidiaries. However, the Government contended, and the Court of Appeals held, that petitioner could not take an indirect credit for any part of the remaining standard tax paid by petitioner's U. K. subsidiaries.

In so holding, the Court of Appeals did not challenge petitioner's assertion that under the Convention, the standard tax appropriate to a dividend must be treated as a dividend withholding tax imposed directly on the

recipient of the dividend.[10] Nor did the Court of Appeals deal directly with petitioner's assertion that the remaining standard tax is not covered by Article XIII of the Convention and must therefore continue to be treated under the *Biddle* case as a corporate tax imposed on the foreign subsidiary paying the dividend.[11] Instead, the Court of Appeals based its decision on the premise that, if a direct credit is allowed under the Convention for the amount of standard tax which is appropriate to the dividend under British law, "the taxpayer's use of a § 902 [indirect] credit for the remaining standard tax results in a credit for foreign tax allocable to earnings which were not distributed as dividends" (Appendix A, p. 9a). Since the Court of Appeals regarded this as an impermissable result in view of the overall purpose of the foreign tax credit provisions, the Court held that no indirect credit could be taken for any part of the standard tax if a direct credit was claimed under the Convention.

We submit that this analysis makes a nullity of the *Biddle* decision in any case where a corporate shareholder elects Convention relief. In fact, there is no justi-

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[10] Since individuals are permitted to claim credit only for foreign taxes actually paid by them (p. 7, *supra*), the undisputed fact that individuals may credit the standard tax appropriate to the dividend under Article XIII is proof that this tax is regarded for U. S. tax purposes as having been imposed on the shareholder receiving the dividend, rather than the foreign corporation paying it, if treaty relief is elected.

[11] Because the Convention "does not revoke the principle of the [*Biddle*] case which is still effective except in the particular situation covered by the treaty" (Owens, op. cit., p. 366), the portion of the standard tax to which Article XIII does not apply must still be regarded as a British corporate tax. *Cf.* Rev. Rul. 56-289, 1956-1 C.B. 321 and *Brantman* v. *United States*, 157 F.Supp. 885 (N.D. Calif. 1958).

fication for doing so, because the statute permits corporate stockholders to take direct and indirect credits simultaneously.

Since the standard tax appropriate to the dividend is regarded under the Convention as a tax actually paid by the recipient of the dividend (n. 10, *supra*), allowance of a *direct* credit for that tax cannot affect the calculation of the *indirect* credit which relates solely to the foreign taxes paid by the foreign subsidiary. Moreover—and this is most important—the calculation of the amount of standard tax appropriate to the dividend which may be credited under the Convention has nothing to do with the amount of tax actually paid by the British corporation on the earnings distributed as a dividend. For example, suppose that an American shareholder owns all the stock of a British corporation. In Year 1, the corporation has $100 of earnings which are subjected to standard tax at the rate of 40%, leaving the corporation with after-tax earnings of $60. In the following year, when the standard tax rate has gone up to 50%, the corporation distributes half of its accumulated Year 1 earnings, or $30. The standard tax *actually* paid on the distributed earnings is $20 (i.e., half of the $40 tax actually paid). However, since the shareholder is entitled under the Convention to claim a credit at the *current* standard tax rate, the shareholder will be able to take a credit of $30, which is the amount of standard tax appropriate to a $30 net dividend at a 50% rate. (See R. 16a-17a). The direct credit of $30 allowable under the Convention will therefore exceed the $20 of tax actually paid on the distributed earnings. In its brief (p. 22, fn. 25) and reply brief (p. 5, fn. 3) in the Court of Appeals, the Government conceded that this is the effect of Article XIII.

In its opinion (Appendix A, pp. 8a, 9a) the Court of Appeals suggests that the only purpose of Article XIII is to avoid double taxation, and that consequently, a claimed credit should not be allowed where "there is no danger of international double taxation". Obviously, however, the effect of the Convention is broader than the Court's opinion indicates, because it is possible, as shown above and conceded by the Government, to get credits under the Convention alone for amounts in *excess* of the total foreign tax actually paid on the distributed earnings. Taxpayer is not here claiming such credits, but the point is significant because it clearly proves that Convention relief was intended to extend to cases where there was no danger of double taxation at all.

Because Article XIII of the Convention applies only to the standard tax "appropriate to" the dividend, the remaining standard tax retains its character under *Biddle* as a British corporate tax, and is therefore eligible for the indirect credit. Although the Court of Appeals' opinion indicates that this would result in allowing a credit for taxes "allocable to earnings which were not distributed as dividends" (Appendix A, p. 9a), the opinion fails to mention the stipulated fact (R. 22a-23a) that the formula prescribed by this Court in the *American Chicle* case, *supra,* was used in calculating the indirect credit claimed by petitioner in the present case. The whole point of that formula is to limit the indirect credit to the amount of foreign corporate tax allocable to the distributed earnings, and the formula has that effect in the present case.

If the dividends received by petitioner from its British subsidiaries in 1958 had been subject to an actual withholding tax of 38.75% (the standard tax rate in

effect in 1958), petitioner would unquestionably have been entitled to take a direct credit for 100% of the withholding tax, plus an indirect credit for a fractional part (determined in accordance with the *Chicle* case) of the remaining U. K. taxes paid by the British subsidiaries. (See p. 10, *supra*). While no withholding tax, as such, was actually imposed in 1958, the Convention has the effect of treating the amount of standard tax appropriate to the dividends at the 38.75% rate as though such tax were a withholding tax. Accordingly, petitioner claimed (R. 22a, 16a-18a), and is entitled to, a direct credit for that amount of tax. Under *Biddle*, the remaining standard taxes, along with the profits taxes paid by the U. K. subsidiaries, are eligible for the indirect credit, just as they would be if an actual 38.75% withholding tax had been imposed. Of course, petitioner is not entitled to an indirect credit for the full amount of the remaining taxes, and has not claimed such a credit. On the contrary, petitioner has claimed an indirect credit only for the fractional portion of those taxes attributable to the dividends it received, determined in accordance with the *Chicle* case. (R. 22a-23a)

The implication in the Court of Appeals' opinion that allowance of combined direct and indirect credits in this fashion would produce an excessive overall credit is dispelled by the stipulated fact (which is not mentioned in the Court's opinion) that the combined credits claimed by petitioner were within the limitation established by § 904 of the Code. (R. 27a). Since the purpose of the § 904 limitation is to prevent the credit for taxes paid to a foreign country from being used to eliminate the U. S. tax on income received from other sources (*Dexter* v. *Commissioner*, 47 B.T.A. 285, 291 (1942), *acq.* 1948-2 C.B. 1), a claimed credit which admittedly

falls within the limitation can scarcely be termed excessive.

2. The effect of the Court of Appeals' decision is to deprive petitioner, and other similarly situated corporate taxpayers, of the benefits afforded by a tax convention which this Court has described as "a solemn treaty between this Nation and a foreign sovereign". *Maximov v. United States*, 373 U.S. 49, 54 (1963). If a taxpayer-corporation which elects to claim a direct credit under the Convention thereby loses its right to take an indirect credit for standard tax under the Code—which is what the Court of Appeals held—the end result for the taxpayer will normally be a smaller credit and a greater net U.S. tax than if the taxpayer had ignored the Convention and claimed an indirect credit under the Code alone. This was true in the present case, and in order to avoid penalizing petitioner for claiming a Convention credit, the Internal Revenue Service had to recompute petitioner's credit under the Code alone. (R. 34a, R. 25a-26a). In short, under the Government's theory and the decision of the Court of Appeals, it would have been a burden rather than a benefit to petitioner to have its foreign tax credit computed under the Convention and Code combined.[12]

As previously stated, the *Biddle* decision made it impossible for many U.S. taxpayers to claim any credit at all for the U.K. standard tax, but even under *Biddle*, corporate stockholders owning at least 50% of the vot-

[12] Under certain fortuitous circumstances, some of which are described in Owens, op. cit., pp. 370-371, claiming a Convention credit could benefit the taxpayer even under the approach taken by the Government and the Court of Appeals. However, we can find nothing in the legislative history of the Convention to suggest that the Convention was intended to furnish relief only in these limited circumstances.

ing stock of a British subsidiary were still in a position to claim an indirect credit for U.K. standard tax under the Code. (See p. 12, *supra*, at n. 7). As a theoretical matter, the negotiators of the Convention might therefore have decided that Article XIII relief should not be extended to corporate taxpayers like petitioner who were already entitled to claim an indirect credit for the full amount of U.K. tax under the Code. Alternatively, the negotiators might have decided to give such taxpayers the option of using Article XIII or the Code, but not both. In point of fact, however, the negotiators did neither of these things. It follows, therefore, that the Convention was designed to afford corporate taxpayers such as petitioner additional relief above and beyond the indirect credit which they could already obtain under the Code alone.[13] The relief intended by the negotiators of the Convention can be afforded by applying the Convention according to its plain terms, without reading in implied limitations as the Court of Appeals did. *Cf. Maximov* v. *United States, supra.* It follows that petitioner is entitled to claim Article XIII relief for the portion of the U.K. tax to which that Article relates without foregoing its right to take a regular indirect credit under the Code for the remaining U.K. tax.

3. Because the Finance Act of 1965 (p. 10, *supra*) changed the method of taxing British corporations, the issue presented here will not arise under current law. Nevertheless, the issue has current significance. We are advised that other United States corporate taxpayers

[13] To obtain such relief, the taxpayer must pay a partial price by including in income the amount of standard tax credited under the Convention—an amount which would not be includable in income if a credit were claimed under the Code alone. Petitioner paid this intended price by including the amount of such tax in its reported income. (R. 22a)

with United Kingdom subsidiaries have the question pending for prior years which are still open under the statute of limitations, and in view of the considerations previously discussed, we therefore believe that the question is one which merits further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be granted.

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